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In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-863, 71-864, 71-865, 71-866

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (App. 446) is reported at 450 F. 2d 642. The opinions of the Federal Communications Commission (App. 247, 357) are reported at 25 F.C.C. 2d 242 and 25 F.C.C. 2d 216.

JURISDICTION

The judgment of the court of appeals (App. 493) was entered on August 3, 1971, and reissued on October 29, 1971 (U.S. Pet. App. 155a–156a). A timely petition for rehearing and suggestion of rehearing *en banc* was denied on October 4, 1971 (App. 494). The petition for a writ of certiorari was filed on January 3, 1972, and was granted on February 28, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the powers granted to it by the Federal Communications Act, and in light of the inherent limitations on the broadcast spectrum, the Federal Communications Commission, which under its "Fairness Doctrine" requires broadcast licensees to present programming involving controversial issues of public importance, must, because of the First Amendment, also require that the licensees sell time to individuals and groups for the advertising of their particular views.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part:

> The Congress shall make no law * * * abridging the freedom of speech * * *.

Section 3(h) of the Communications Act of 1934, 48 Stat. 1064, *et seq.*, as amended, 47 U.S.C. 153(h), provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire,

in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 86 Stat. 717, 47 U.S.C. 315(a), provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall

be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT

These cases arose on petitions for review (App. 419, 422) of two orders of the Federal Communications Commission, announced on the same day (App. 247, 357), regarding claims that commercial radio and television broadcasters cannot refuse to sell any broadcast time for editorial advertisements concerning controversial issues of public importance. Both complainants—Business Executives' Move for Vietnam Peace (BEM), a national organization composed of business executives, and the Democratic National Committee (DNC), the governing body of the national Democratic Party between conventions—urged that broadcasters were required to accept editorial advertisements without regard to whether the station licensee had otherwise fulfilled its affirmative and continuing obligation under the Commission's Fairness Doctrine to inform the public on questions of public importance by presenting representative and contrasting views. The court of appeals reversed the Commission's orders denying these claims and remanded the cases for further proceedings, holding that under the First Amendment the Commission cannot permit broadcasters to maintain a flat ban on

public issue advertisements when other commercial messages are accepted, notwithstanding the broadcasters' coverage of public issues under the Fairness Doctrine (App. 446). The court directed the Commission to develop reasonable procedures and regulations for determining which and how many editorial advertisements shall be broadcast.

A. BEM'S REQUEST FOR BROADCAST TIME

1. *The Proceedings Before The Commission.* On January 22, 1970, BEM filed a complaint with the Commission alleging that radio station WTOP, Washington, D.C., had refused to sell it time to broadcast one-minute spot announcements expressing opposition to the Vietnam war.[1] The station had a general policy of refusing to sell spot announcement time to persons or groups desiring to air their views on controversial public issues (App. 292, 316; 450–451 n. 3), and BEM claimed that the station's refusal to sell time on this basis violated the First Amendment and the Fairness Doctrine.[2] BEM stated, without supporting data, that the station had regularly presented pro-Vietnam war views, but had not devoted any significant amount of time to the other side.

WTOP responded that it had covered all viewpoints on the war and that although a complete quantitative evaluation of its coverage of such a long-term issue was not possible, particularly since WTOP is an all-

[1] BEM included sample announcements with its complaint (App. 298–306).

[2] See Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a).

news station, a spot check of the three months surrounding BEM's request showed that the station's news reports included on numerous occasions the views of a variety of critics of the war, in addition to hard news coverage of the war. Four station commentators had also reflected various viewpoints on the subject (App. 312–319).[3]

On March 31, 1970, the Commission requested WTOP to submit by April 7 a statement on whether it had presented the viewpoints embodied in the complainant's announcements (App. 349). In response, WTOP submitted an affidavit of its Executive Editor stating that each of the viewpoints in the BEM announcements had been expressed a number of times over WTOP (App. 352). BEM commented by saying that the affidavit added nothing new (App. 353).

2. *The Commission's Decision in BEM.* In its decision of August 5, 1970, the Commission viewed BEM's complaint as charging (1) that WTOP had failed to meet its fairness obligation with respect to the Vietnam War; and (2) that the station's refusal to carry BEM's announcements violated the Fairness Doctrine and the First Amendment (App. 357–368). With respect to the fairness aspect of the complaint, the Commission found that BEM had not demonstrated that WTOP had failed to fulfill its respon-

[3] WTOP also referred to its coverage of particular events related to the war, such as Moratorium activities in October and November of 1969; the President's speech on Vietnam on November 3, 1969, in connection with which it had presented critics of the war; and its news interview programs, which had also presented national figures both for and against the war policies. (App. 314–315.)

sibility to afford a reasonable opportunity for the presentation of significant contrasting views in its overall programming; the licensee had specified a number of specific instances in which it had presented anti-Vietnam war views, while the complainant had made no more than a general allegation of a failure to present conflicting views (App. 360–365).[4]

The Commission further held that WTOP's policy of refusing to sell time for spot announcements on controversial issues did not *per se* violate the Fairness Doctrine or any Commission policy. The Commission noted that a broadcast licensee is not a common carrier under the Act and therefore is not required to open its doors to all persons seeking to use its facilities. Since the licensee had presented contrasting views on the Vietnam war, including the viewpoints embodied in BEM's announcements, the Commission found no reason to require the station to present the views of any particular group in any particular format. It also relied upon the more extensive analyses set forth in its *DNC* decision issued the same day.

As to BEM's contention under the First Amendment, the Commission ruled that *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, did not support BEM's constitutional

[4] The Commission adhered to its established policy that in the absence of specific evidence of a failure to comply with fairness requirements, it would not be reasonable to require a licensee to prove the contrary by producing transcripts or recordings of all of its programs touching on an issue. Here, BEM had not afforded any basis for its complaint on fairness (App. 364).

claims and, relying on its decision in the *DNC* case, *infra,* concluded that BEM's position that WTOP must sell it time is inconsistent with the system of broadcasting created by Congress (App. 368):

> * * * the Communications Act specifically provides that a broadcaster shall not be deemed a common carrier, and thus he may exercise his judgment as to the particular program matter he will present. The licensee is thus constantly called upon to make choices between types and formats of programming and the persons to participate therein. If the licensee were required to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt. [Citation omitted.]

Four Commissioners joined in the opinion, two concurred in the result, and Commissioner Johnson dissented.

B. DNC'S REQUEST FOR A DECLARATORY RULING

1. *The Proceedings Before the Commission.* On May 19, 1970, while the BEM complaint was under consideration, DNC requested the Commission to issue a declaratory ruling that (App. 33–34):

> a. A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues; or, alternatively,
>
> b. Any such "general policy" will be taken into consideration—in a manner adverse to the broadcaster—by the Commission in evaluating

whether the grant of a broadcaster's renewal application accords with the public interest.

DNC alleged that televised requests for funds were essential to the integrity of the nation's political processes, as well as to relieve its own precarious financial situation, and that it must promptly launch a national radio and television appeal for funds but could not do so unless "it can be certain that it will be able to obtain the access to the broadcast media which implementation of the plan demands" (App. 16–22). DNC contended that a broadcaster's refusal to grant access to its facilities by responsible groups violates the First Amendment as construed by this Court in the *Red Lion* case, and also contravenes the public interest standards of the Communications Act (App. 25–33).[5]

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[5] The three major networks, American Broadcasting Co. (ABC), National Broadcasting Co. (NBC), and the Columbia Broadcasting System (CBS), submitted comments in response. NBC advised in a brief letter (App. 47) that it had no policy preventing it from selling program time to major national political parties during non-campaign periods for the purpose of presenting the parties' views on controversial issues of public importance, that it would permit solicitation of funds, and that it had in fact offered to sell prime time to DNC for a program. ABC set forth excerpts from its Standards and Policies indicating that except for religious broadcasts, ABC permitted solicitations of funds only with its specific permission; that it would sell time to candidates, their representatives or political organizations upon the opening of an election campaign as determined on the basis of appropriate election laws, or, in its discretion, prior to the official opening of a campaign where it determined that individuals or organizations had a recognized interest in the forthcoming campaign; and that whenever it permitted its facilities to be used for the presentation of one viewpoint, it would afford opportunity for the presentation of

2. *The Commission's Decision on DNC's Request.* In an opinion rendered on the same day as its decision in ***BEM,*** the Commission upheld DNC's claims regarding solicitation of funds by political parties. The Commission noted that none of the three major television networks now had a policy against selling time to political parties for fund raising during non-campaign periods (App. 269), but that CBS's previous policy "of confining such sales of time to election periods would appear arbitrary, since the need for the widest possible financial support for political parties

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contrasting views and would itself decide what subjects were of such interest or importance as to warrant time for their presentation. In the absence of special public interest considerations, however, ABC would not sell time for comment on controversial public issues or for the solicitation of funds. In view of the importance of maintaining strong and viable major political parties, however, ABC proposed to permit fund solicitation by the parties on a reasonable basis. In addition, ABC contended that making time available to any responsible entity that wished to advance its views on controversial issues of public importance or to solicit funds would raise serious problems under the Fairness Doctrine. (App. 42–46.)

CBS submitted a lengthy response, with attachments (App. 48–242). It stated that it would permit the presentation by political parties of a special category of spot announcements for the purpose of fund raising, and that these announcements would not have to be on behalf of candidates or ballot propositions (App. 58). As to a right of general access, however, CBS stated that the public is best served by the presentation of issues and viewpoints within a balanced program schedule, utilizing newsworthiness as the sole criterion; that a regulatory policy imposing common carrier obligations on broadcasters would be contrary to the public interest; that there is no constitutional right to compel broadcast stations to carry programs; and that Congress and the Commission had specifically rejected such a requirement.

is not confined to such periods * * *" (App. 272).

With respect to the question of access, the Commission rejected DNC's contention that individuals or groups have a right to purchase time to comment on public issues—a contention viewed by the Commission as going "to the heart of the system of broadcasting which has developed in this country * * *" (App. 256). The Commission reviewed the licensee's responsibility, as a public trustee, to meet the needs and interests of the public in the various categories of programming, including the special obligation to devote broadcast time to the presentation of news and public affairs, and the discretion necessarily afforded the licensee in discharging his obligations. This discretion, the Commission emphasized, must be exercised in a manner consistent with the public interest (App. 259): "representative community views and voices on controversial issues which are of importance" must be presented and "[a] licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.'" As stated in the *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949):

> It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

Applying these principles to DNC's request, the Commission could not find that a licensee fulfilling these overriding public interest responsibilities nonetheless operates in a manner inconsistent with the public interest or the First Amendment when it refuses to sell time to individuals or groups wishing to express their particular views. While "there is of course no Commission policy thwarting sale of time to comment on public issues" (App. 265), Congress had specifically refused to impose common carrier responsibilities in the broadcast area (App. 260) and the Court in *Red Lion,* as had the Commission in its *Report on Editorializing,* stressed "the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities" (App. 263).

Thus, recognition of "a near-absolute right of any person who has the money to buy time * * * would create a common carrier situation which Congress after due deliberation, specifically rejected * * * (App. 267). And, in the Commission's view, it would be contrary to the public interest to transfer responsibility for what should be broadcast from the licensees acting as public trustees to those affluent individuals or groups with the resources to buy air time (App. 263–264). There would be serious practical difficulties in administering such a system, where access would depend on the financial resources of the person seeking to state his opinions on public issues. These problems could not be solved by a "first come, first served platform" (App. 269), which itself would be against the public

interest and would tend to undermine the rationale for the Commission's requirement that broadcasters present contrasting views at the broadcaster's expense if necessary [6] (App. 267–268).

The Commission concluded that neither the Act nor the First Amendment compels such a result. It pointed out that broadcasting is not analogous to other government regulated forums such as public parks or transit systems since in those areas, unlike broadcasting, there is no independent obligation of a licensee to present representative views reflecting opposing viewpoints on public issues.

Five Commissioners joined the opinion; one concurred (App. 273) and Commissioner Johnson dissented (App. 274–287).

C. THE COMMISSION'S INQUIRY INTO ACCESS TO THE BROADCAST MEDIA BY INDIVIDUALS AND GROUPS

On June 19, 1971, after the argument in the court of appeals in these cases, but before the court's decision, the Commission issued a *Notice of Inquiry in Docket 19260,* 30 F.C.C. 2d 26, 36 Fed. Reg. 11825, instituting a broad study into the efficacy of the operation of the fairness doctrine. The Commission specifically undertook the study "in the light of current demands for access to the broadcast media to consider issues of public concern." However, the Commission cautioned that it could not

> abandon the fairness doctrine or treat broadcasters as common carriers who must accept all material offered by any and all comers. The

[6] *Cullman Broadcasting Co.*, 40 F.C.C. 576.

> Communications Act is explicit in these respects (see Section 315(a) and Section 3(h)) and we take the Act as a "given" from which this inquiry necessarily proceeds. * * * [30 F.C.C. 2d at 26–27.]

Rather, the Commission sought comments on whether the policies it has developed under the Act are the most effective means of fostering " 'uninhibited, robust, wide-open' debate on public issues (*New York Times* v. *Sullivan,* 376 U.S. 254, 270)":

> The basic issue we pose here is whether Commission-made policies indeed promote that goal to the maximum extent. Or, are there revisions or even entirely new policies that would serve it more effectively?
>
> * * * It is most important to note in this connection that, to a major extent, ours is a commercially based broadcast system and that this system renders a vital service to the Nation. Any policies adopted by this Commission in the areas covered in the present inquiry should be consistent with the maintenance and growth of that system and should, among other appropriate standards, be so measured. * * * Proposals that in the short run might afford great insight into public issues, but in the long run might tend to undermine the existing broadcast system—e.g., nothing but informational programming in a debate format—would not, in this view, serve the public interest. [30 F.C.C. 2d at 27.]

Noting that it had been 22 years since the Commission's 1949 *Report on Editorializing, supra,* the Commission observed that it was time for another

overview: "If our policies are sound, they should have stood the test of time and application. If they unreasonably restrict the journalistic functions of broadcasters or permit broadcasters unreasonably to restrict access—then corrective action is called for."

Specifically recognizing that the respondents in these cases had claimed that the present system of access under fairness is inadequate, the Commission devoted Part IV of the study to the question whether "there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." 30 F.C.C. 2d at 33. It called for comment on the problems raised by paid and free time, the specific standards for determining how access time should be allocated, and the effect of access by others on the licensees' general responsibility to the public and on the licensees' duties under the fairness doctrine. In sum the Commission addressed its inquiry to whether criteria or guidelines for public access can and should be prescribed, or whether the complex problems in doing so require that decisions on access be left to the responsible discretion of the broadcast licensees, subject to correction of abuses on complaint to the Commission (36 Fed. Reg. 11827).

D. THE DECISION OF THE COURT OF APPEALS

Upon petitions for review filed by BEM and DNC pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), the court of appeals, with Judge McGowan dissenting, reversed. The court summarized its holding as follows (App. 449):

> We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

In reaching this result, the court first found "state action" because of the extent of governmental regulation of broadcasting; the importance of the use of the licensed broadcasting media for the communication of ideas; and the Commission's refusal to disapprove the policy of some licensees not to accept editorial advertising (App. 458–464).

The court then discussed the question of access. Although recognizing that the physical limitations of broadcast time necessarily restrict access to the airwaves, the court concluded that within these limitations there is nevertheless under the First Amendment "a reasonably regulated, 'abridgeable' right to speak" held collectively by the general public (App. 467). This abridgeable interest, in the court's view, is derived from the following: the public's right to receive ideas and information (App. 466); the public's "First Amendment interest in the mode or manner—as well as the content—of public debate aired on the

broadcast media" (App. 466–467); and "the interest of individuals and groups in effective self-expression" (App. 467). Moreover, the court held that if commercial advertising is sold at all, a total ban against editorial advertising by broadcasters violates the First Amendment because such a ban discriminates against controversial speech in favor of commercial speech (App. 474–480).

The court ordered the Commission to develop reasonable guidelines governing acceptance of editorial advertisements by broadcasters and remanded the cases to the Commission for this purpose (App. 480–489).

Judge McGowan, dissenting, stated that the responsibilities of broadcast licensees to present controversial views on issues of public importance, subject to the fairness doctrine, satisfied the requirements of the First Amendment. He noted that "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. * * * It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired * * *" (App. 490). He concluded that "within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance," the First Amendment permits, but does not require, licensees to accept paid editorial advertising (App. 491). On the other hand, under the majority's decision, "The Commission has, at the least, been set a task of heroic proportions, and one whose

very complexities may undermine the premise upon which it is founded" (App. 490).

E. SUBSEQUENT DEVELOPMENTS IN THE COMMISSION'S INQUIRY INTO FAIRNESS AND ACCESS

After denial by the court of appeals of motions for rehearing (App. 494) and stay of the mandate (App. 496, 498), the government applied to this Court for a stay of the mandate. When this Court initially denied that motion on January 24, 1972, the Commission published a further notice of inquiry soliciting comments on the procedures and guidelines necessary to carry out the mandate of the court of appeals. *Further Notice of Inquiry in Docket 19260,* 33 F.C.C. 2d 554, 37 Fed. Reg. 3383.[7]

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[7] The Commission asked the parties particularly to address the following areas (33 F.C.C. 2d at 555–556):

a. May a licensee limit the time available for editorial advertisements and, if so, on what basis?

b. What regulation may the licensee make as to the placement of editorial advertisements?

c. May a licensee prevent domination by a few groups or a few viewpoints and, if so, by what means?

d. May a licensee reject a proffered advertisement on the ground that the particular viewpoint has been sufficiently expressed, short of finding undue dominance?

e. May a licensee reject a proffered advertisement on standards of taste and suitability for access to the home?

f. May a licensee reject a proffered advertisement on the ground that its subject matter is of little or no significance or interest to the community?

g. Are any restrictions on content permissible short of a finding that the material is outside the protection of the First Amendment?

h. Should the Commission's *Cullman* doctrine be applicable to editorial and controversial issue advertisements

When this Court granted certiorari on February 28, 1972, it also stayed the mandate of the court of appeals. The Commission then withdrew the above notice. However, it continued its overall inquiry into the fairness doctrine. With specific regard to access, the Commission requested comments on:

> What policies, if any, concerning access to the broadcast media might properly and feasibly be evolved under the public interest standard of the Communications Act, and what would be their relationship to, and effect upon, present or proposed fairness doctrine policies. We, thus, do not invite comment on what the First Amendment may or may not *require* in this area, but rather on pertinent public interest considerations, including of course the policy of fostering robust, wide-open debate. [*Order and Further Notice of Inquiry in Docket 19260*, 33 F.C.C. 2d 798, 799, 37 Fed. Reg. 4980.][8]

Written comments have been filed and oral presentations were made during panel discussions and oral

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which the licensee would not have aired in the first place except for the required sale of editorial advertising time?

i. What is the relationship generally of editorial advertising to the licensee's responsibilities under the fairness doctrine to make available a reasonable opportunity for the presentation of conflicting views on controversial issues of public importance? In this connection consideration should be given to the decision of the Supreme Court in *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969).

[8] The Commission confined its inquiry to the non-constitutional aspects of access because the First Amendment issue had been placed before this Court for determination and certiorari had been granted. It also stated "that final decision * * * may be delayed and made in light of the Supreme Court's action." 37 Fed. Reg. 4980.

argument[9] before the Commission during the week of March 27, 1972.

SUMMARY OF ARGUMENT

A

The Commission's Fairness Doctrine, as developed over many years of broadcast regulation, as approved by Congress and as sustained by this Court in *Red Lion,* requires licensees to operate as public trustees, giving coverage to public issues that is adequate and that fairly reflects opposing views. This must be done at the broadcaster's own expense if necessary. In addition, the broadcaster has an affirmative obligation to discover and fulfill the needs and desires of his particular service area. Failure to comply with these duties can result in loss of the license to broadcast.

Freedom of broadcast journalism is thus subordinated to the public interest in hearing diverse views, although the broadcaster must still exercise discretion in determining how to allocate broadcasting time between the various areas of interest to the public. And, in serving the "paramount" right[10] of the listeners and viewers with respect to issues of public importance, the licensee must use responsible journalistic judgment in choosing the format for the program and the spokesmen to present opinions on the question.

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[9] The scheduling of the panel discussions and oral argument, as well as the agenda, were set forth in an *Order in Docket No 19260*, 33 F.C.C. 2d 800, 37 Fed. Reg. 4578.

[10] *Red Lion*, *supra*, 395 U.S. at 390.

B

In holding that the First Amendment requires broadcasters to sell advertising time to persons wishing to discuss controversial public issues regardless of whether the broadcaster has fulfilled its obligation under the Fairness Doctrine to cover such issues fully and fairly, the court of appeals relied on the public's interest in the content of discussion, in the mode of presentation, and in effective self-expression.

While the Commission obviously shares these concerns since they are the very foundation of the Fairness Doctrine, the court's conclusion—that the Constitution compels the Commission to institute a regulatory scheme forbidding broadcasters from having a policy of not selling time for editorial advertisements—does not follow. When it comes to how the Commission should affirmatively promote the public's First Amendment interest in the communications media, the Constitution permits a range of choices, just as the Constitution allowed Congress a range of choices in deciding what kind of system of broadcast regulation would best serve the public interest, convenience and necessity. Of course, when the Commission does develop a certain regulatory scheme such as the Fairness Doctrine, this must be consistent with the First Amendment; and whether it is depends not only on the objective but also on the means adopted to achieve it.

But if the Commission refrains from adopting a particular affirmative policy, as it did here, its decision should be sustained as within permissible limits of constitutional choice if the Commission has reason-

able grounds, in light of the existing regulatory system, for not adopting it. Otherwise, whatever a court, on the basis of the limited information before it, deems best to encourage freedom of speech on the airwaves will become frozen into the Act. And the Commission and Congress would thereby be ousted of their decision-making roles in the highly complex and important area of commercial broadcasting where the question of what ought to be done is often intertwined with the practical administrative question of what reasonably can be done.

C

1. In refusing to recognize and implement the right of access claimed by respondents, the Commission acted consistently with First Amendment values and in accordance with the regulatory system Congress enacted. Section 3(h) of the Communications Act, 47 U.S.C. 153(h), declares that broadcasters are not common carriers. The legislative history of the Act and its predecessor, the Radio Act of 1927, shows that Congress explicitly rejected a provision that would have required licensees to act as common carriers with respect to questions affecting the public.

The court's decision pushes broadcasting very far in the direction Congress disapproved, yet the system of broadcast regulation Congress legislated has never been thought to be outside the permissible limits of constitutional choice. In light of Section 3(h), the Commission reasonably refused to recognize a right of access as broad as that suggested by the court below and, instead, began a general inquiry to determine

whether there is any feasible method of providing additional public access within the present statutory structure. This is a sound approach to such a complex problem and it is a constitutionally permissible one.

2. The court of appeals held that a broadcaster's refusal to sell time for editorial advertisements discriminates against public issues in favor of commercial advertising. But this question can properly be viewed only in terms of how the broadcaster allocates air time between commercial uses and public issue speech. And since licensees must devote substantial air time to public issues regardless of whether they accept product advertising, there is no discrimination.

Moreover, contrary to the court of appeals' assumption, broadcasters do exercise control over product advertisements; indeed they have an obligation to do so. And the general duties of broadcasters—both commercial and non-commercial—under the Fairness Doctrine extend to every minute of every day the station is on the air. It does not make a constitutional difference that some broadcasters accept commercial advertising; at the least, the Constitution allows the Commission to develop a regulatory system, as it has done, that makes no such distinction.

3. There are, moreover, practical reasons why it was reasonable for the Commission to conclude that it should not recognize and implement the right of access claimed by respondents.

The "right" created by the court below is a right of access only for those persons wealthy enough to purchase air time and could therefore lead to domination

of the discussion of public issues by the rich. Yet this Court in *Red Lion,* 395 U.S. at 392, expressed disapproval of a system in which the "highest bidders" would get the available time. Indeed it has already been suggested that the result reached by the court below on the basis of the First Amendment, if implemented, would itself be unconstitutional because it discriminates against the poor.

Moreover, a first-come, first-served system of apportioning the limited time available could still lead to domination by the rich, who could make continued requests for time. It is no answer to say that the Commission could devise rules for determining whether one person's speech should be broadcast instead of another's. That would interject the Commission, as never before, into day-to-day programming decisions. The Commission reasonably decided not to embark upon such a venture, at least not without further study.

Furthermore, if the Commission's *Cullman* doctrine were applied to editorial advertisements that broadcasters were compelled to accept, the broadcasters would be required to present contrasting views, free-of-charge if necessary. But Commissioner Cox, concurring in *DNC* (App. 369), pointed out that requiring broadcasters to correct imbalances they had not created by allowing free reply time would "unreasonably expose them to erosion of their advertising revenues." While it was suggested below that the solution would be to suspend the Fairness Doctrine in this area, that would hardly result in a better regulatory system than the present one, which requires broad-

casters to give full coverage to public issues and to present contrasting views.

Finally, the court's decision thrusts the Commission into the role of arbiter, with each refusal to sell time giving rise to a potential First Amendment claim. Even if the Commission could find a way of deciding competing claims for the limited time available on a basis that would not prefer one person's speech over another's, the danger that this eventually would occur is real—and it is a danger the Commission has sought to avoid in developing the issue-oriented Fairness Doctrine, which requires licensees to exercise reasonable discretion in determining what spokesman should present the various sides of a public issue and in what format the presentation should be made.

Before the court had rendered its decision here, the Commission had begun a comprehensive inquiry to consider what changes, if any, should be made in the present regulatory system with respect to coverage of controversial public issues. The need for this kind of far-reaching and thorough inquiry, which the Commission has resumed, is one of the reasons why Congress created an administrative agency to deal with such important and complex matters of regulatory policy.

Since the Commission's refusal to implement, at this time, the right of access claimed by respondents was reasonable in light of the foregoing considerations and of the protections afforded by the Fairness Doctrine to the public's First Amendment interest in broadcasting, the court of appeals should have affirmed the Commission's decisions in these cases.

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ARGUMENT

Because the broadcast spectrum is limited, its use must be regulated to accommodate the interests of all, lest in the "cacaphony of competing voices" none will clearly be heard. *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 376. Accordingly, no individual or group has "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." *Id.* at 388. "It is the right of the viewers and listeners * * * which is paramount." *Id.* at 390. To implement this right of the listening and viewing public, choices must be made among various means of accommodating the public's interest in maintaining freedom of speech within the inherent physical limitations on access to the airwaves. In the public interest standards of the Communications Act of 1934, and in the 1959 amendment to Section 315 of that Act, Congress charged the Federal Communications Commission with the primary responsibility of making these choices. The decision of the court of appeals in this case substantially encroaches upon that responsibility. In effect it transfers the making of basic policy judgments from the Commission to the courts, and, in so doing, sets a significant new course for broadcasting, a course that in our view is both unwise and unwarranted. This case has great importance because of the immediate consequences of the court's decision for radio and television broadcasting, but it is important too because of what the decision below portends for the future role of the Commission and the courts in the regulatory system Congress has legislated.

IT WAS REASONABLE AND CONSTITUTIONALLY PROPER FOR THE FEDERAL COMMUNICATIONS COMMISSION TO REFRAIN FROM RECOGNIZING AND IMPLEMENTING THE RIGHT OF ACCESS CLAIMED BY RESPONDENTS, AND TO RELY, INSTEAD, ON THE EXERCISE OF JOURNALISTIC DISCRETION IN THIS AREA BY BROADCAST LICENSEES WITHIN THE FRAMEWORK OF THEIR OBLIGATIONS UNDER THE FAIRNESS DOCTRINE

A. THE FAIRNESS DOCTRINE IS THE FUNDAMENTAL SAFEGUARD OF THE PUBLIC'S FIRST AMENDMENT INTEREST IN BROADCASTING

Congress brought order to the chaotic state of broadcasting in 1927 by repudiating the doctrine that "anyone who will may transmit" and replacing it with the principle "that the right of the public to service is superior to the right of any individual * * *."[11] In the Radio Act of 1927[12] and the Communications Act of 1934,[13] which essentially reenacted the earlier law,[14] Congress preserved public ownership of broadcasting channels,[15] provided that broadcasters would be licensed and regulated on the basis of "public convenience, interest or necessity,"[16] set up an expert administrative agency "to carry out its legislative policy,"[17] and charged the agency with the duty of promoting "the larger and more effective

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[11] 67 Cong. Rec. 5479 (remarks of Congressman White), quoted in *Red Lion*, *supra*, 395 U.S. at 376 n. 5.

[12] 44 Stat. 1162, as amended, 46 Stat. 844.

[13] 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*

[14] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137.

[15] See 47 U.S.C. 301, 304, 309(h)(1).

[16] 47 U.S.C. 303, 307, 309.

[17] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 138.

use of radio in the public interest."[18] As this Court stated in *Pottsville Broadcasting, supra,* 309 U.S. at 138, "Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors * * *."

From the beginning Congress has recognized that commercial broadcasting is closely related to First Amendment interests.[19] While the Commission may not "interfere with the right of free speech by means of radio communication," 47 U.S.C. 326, it has the duty to regulate broadcasting in the public interest, which includes the public's "collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion, supra,* 395 U.S. at 390.

These objectives have remained in the forefront of broadcast regulation. Only two years after passage of the Federal Radio Act of 1927, 44 Stat. 1162, the predecessor of the Federal Communications Commission held that the "public interest requires ample play for the free and fair competition of opposing views, and * * * the principle applies * * * to all discussions of issues of importance to the public."[20] As radio and television assumed greater importance

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[18] 47 U.S.C. 303(g).

[19] See *Red Lion, supra,* 395 U.S. at 389; *Farmers Union* v. *WDAY, Inc.,* 360 U.S. 525, 529.

[20] *Great Lakes Broadcasting Co.,* 3 F.R.C. Ann. Rep. 32, 33 (1929), reversed on other grounds, 37 F. 2d 993 (C.A. D.C.), petition for certiorari dismissed, 281 U.S. 706.

in our society, the Commission's responsibilities increased accordingly and a regulatory system evolved from these basic precepts.

Thus, with the subsequent approval of Congress (47 U.S.C. 315(a)) and this Court (*Red Lion, supra,* 395 U.S. at 386–401), the Commission developed the Fairness Doctrine, based on the premise that under the Communications Act a broadcast licensee must operate as public trustee.[21] As such, the licensee has a "two-fold duty": to "give adequate coverage to public issues," and to give coverage that is "fair in that it accurately reflects the opposing views." *Red Lion, supra,* 395 U.S. at 377. "This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.,* 25 P. & F. Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source." *Id.* at 377–378. In satisfying these duties, the licensee must make a "diligent, positive and continuing effort * * *to discover and fulfill the tastes, needs and desires of his * * * service area." *En banc Program Policy Statement,*

[21] See, *e.g., En Banc Program Policy,* 25 Fed. Reg. 7291, 7294:

> The licensee is, in effect, a "trustee" in the sense that his license to operate his station imposes upon him a non-delegable duty to serve the public interest in the community he had chosen to represent as a broadcaster.
>
> Great confidence and trust are placed in the citizens who have qualified as broadcasters. The primary duty and privilege to select the material to be broadcast to his audience and the operation of his component of this powerful medium of communication is left in his hands.

25 Fed. Reg. 7291, 7295.[22] The consequence of failure by the licensee to meet these obligations is, as Judge McGowan stated in his dissent in this case (App. 490), loss of the right to broadcast.

In this respect, freedom of broadcast journalism is subordinated to the public's interest in hearing diverse views on matters of public importance and the "paramount" rights of the listeners and viewers are thereby served. See *Red Lion, supra,* 395 U.S. at 389–390. But journalistic discretion must nevertheless be exercised. The broadcaster must still decide how to allocate time between entertainment and non-entertainment programs and how much time to devote to specialized programming on matters such as science, religion, sports, news, education, public affairs, and the interests of minority groups. And with respect to questions of public importance, the "licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1251.

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[22] See, with respect to the licensee's duty to ascertain community needs and interests, *Suburban Broadcasters,* 30 F.C.C. 1021, affirmed, *Henry* v. *Federal Communications Commission,* 302 F. 2d 191 (C.A.D.C.); *Minshall Broadcasting Co.,* 11 F.C.C. 2d 796; *City of Camden,* 18 F.C.C. 2d 412, 418–426 and n. 22; *Primer on Ascertainment of Problems by Broadcast Applicants,* 27 F.C.C. 2d 650.

B. SO LONG AS THE COMMISSION'S REGULATORY PROGRAM SERVES THE PUBLIC INTEREST IN WAYS THAT ARE CONSISTENT WITH FIRST AMENDMENT VALUES, THE CONSTITUTION DOES NOT REQUIRE THE COMMISSION TO ADOPT A PARTICULAR AFFIRMATIVE REGULATORY POLICY THAT ARGUABLY MIGHT FURTHER FREEDOM OF SPEECH IF THE COMMISSION HAS REASONABLE GROUNDS FOR REFUSING TO DO SO

In this case, there has been no showing that any broadcaster failed "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. 315(a). BEM did not demonstrate that its profferred views were novel or different in substance from anti-Vietnam war views already carried on WTOP; and DNC, in seeking a declaratory ruling, made no claim that any particular broadcaster had violated the Fairness Doctrine.[23] The court of appeals nonetheless decided that the First Amendment requires broadcasters to sell advertising time to persons wishing to discuss issues already fully and fairly presented by the station. We submit that the court's holding is, in substance, essentially a disagreement with the Commission on a policy matter that Congress properly entrusted to the agency.

The court of appeals recognized that the licensee's responsibility for the presentation of controversial issues of public importance under the Fairness Doctrine serves the public's right to hear debate on controversial public issues. But, in the court's opinion, the public has an additional interest "in the mode or

[23] Hence, this is not a case involving "a discriminatory refusal [by the Commission] to require the licensee to broadcast certain views which have been denied access to the airwaves." *Red Lion*, *supra*, 395 U.S. at 396.

manner—as well as the content—of public debate aired in the broadcast media" (App. 466); individuals and groups have a First Amendment interest "in effective self-expression" (App. 467). Although in *Red Lion* this Court held that there is no "unabridgeable First Amendment right to broadcast," 395 U.S. at 388, the court below found in the First Amendment a "reasonably regulated, 'abridgeable' right to speak" over the airwaves (App. 467). The licensee's initiation and control of the presentation of controversial public issues, even subject to the requirements of the Commission's Fairness Doctrine, do not, in the court's view, satisfy the First Amendment because they represent only the broadcaster's view of what is important; in addition, some members of the public must have initiative and control over self-expression independent of the licensee's responsibility to determine what shall be broadcast, at least so long as commercial advertisements are accepted. But the court stated that the "abridgeable" First Amendment right of access it defined must be limited and cannot be exercised by all members of the public. Consequently, the plaintiffs in these cases are not necessarily entitled to present their announcements on the air. Instead, the court ordered the Commission to adopt "a scheme of reasonable regulation" that would govern the selling of time for editorial advertising in light of the court's holding that licensees must grant access to some (App. 486).

The Commission and the court below are agreed that broadcast regulation must be guided by the public's First Amendment interests in the communications

media; indeed, Congress and the Commission have recognized this from the outset. And it is common ground that the public has an interest not only in the content of the discussion of controversial public issues, but also, as the court of appeals put it, "in the mode or manner" of the presentation (App. 466); the Commission made this clear when it stated in *DNC* that a "licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open'" (App. 259).[24] There is also no dispute about the court's statement that the public has an interest "in effective self-expression" (App. 467); the Commission itself here warned against the exclusion of "partisan voices" (App. 259).[25]

Rather, the point of departure is that these considerations have led the Commission to develop the Fairness Doctrine, whereas the same considerations led the court of appeals to create what it termed an "abridgeable" right of access. It is apparent that the court's result is far from manifest in the Constitution's command that "Congress shall make no law * * * abridging the freedom of speech * * *." Indeed, the lan-

[24] See also *Storer Broadcasting Co.*, 11 F.C.C. 2d 678; *Anti-Defamation League of B'nai B'rith*, 4 F.C.C. 2d 190, 191, affirmed, 403 F. 2d 169, 170 (C.A.D.C.); certiorari denied, 394 U.S. 930.

[25] See also *Red Lion*, *supra*, 395 U.S. at 392, n. 18 ("The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies.").

guage of the First Amendment scarcely appears to mandate an "abridgeable right" regulated by Commission rules that delineate when an individual may and may not exercise it.

The difficulty is that this is not a traditional First Amendment case involving negative restraints on governmental action. Instead, the question here is whether the government must take certain affirmative action to promote freedom of speech or, more precisely, whether the Commission must institute a regulatory scheme outlawing bans on editorial advertisements in an attempt to promote the public's First Amendment interest in broadcasting. That is a practical question, involving many complexities of implementation as well as potentially far-reaching consequences for the broadcast media and their regulation—a question peculiary suited to administrative determination. If, as in this case, a court decides in favor of such an affirmative regulatory policy solely in terms of what it divines from the First Amendment, then the Commission is ousted from its role of deciding how the public's interest in broadcasting can best be promoted and Congress is rendered powerless to change the court's result. This is not the way such significant regulatory decisions should be made; and it is not the way Congress intended them to be made with respect to broadcasting.

Professor Zechariah Chafee put it well:[26]

> Once we get away from the bare words of the [First] Amendment, we must construe it as

[26] II Chafee, *Government and Mass Communications* 640-641 (1949).

part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government. A part of this work is the regulation of interstate and foreign commerce, and this has come in our modern age to include the job of parceling out the air among broadcasters, which Congress has intrusted to the FCC. Therefore, every free-speech problem in the radio has to be considered with reference to the satisfactory performance of this job as well as to the value of open discussion. Although free speech should weigh heavily in the scale in the event of conflict, still the Commission should be given ample scope to do its job.[27]

This correctly indicates, we believe, that when the Commission formulates regulations for encouraging free discussion over the airwaves, it must act consistently with the First Amendment and that whether it has done so depends not only on the objective but also on the means adopted to achieve it. See *Red Lion, supra.* Likewise, when the Commission refuses to undertake a particular affirmative regulatory policy that arguably would promote freedom of speech, its refusal must be reasonable[28] or, as Judge McGowan

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[27] Professor Chafee added that the First Amendment prevents the Commission from engaging in two kinds of activity: censorship and prejudicial administration that penalizes "the expression of particular ideas." *Id.* at 641–642.

[28] See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177.

speech in the communications media—suggests both regulation and non-regulation and that the appropriate courses to follow in this complex field could be effectively marked "neither directly through self-executing legislation nor by the judicial process." *Pottsville Broadcasting, supra,* 309 U.S. at 142. Moreover, when we deal with any proposed governmental policy to promote First Amendment interests in broadcasting, it is well to remember Professor Chafee's warning that "there is no bright line between encouragement and repression." [30] Before the attempt is made, there should be careful and thorough consideration of the future consequences and of the need for further affirmative action in light of the existing regulatory system and technological developments.[31]

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[30] II Chafee, *supra,* at 710; see also *id.* at 709:

> Whenever anybody is inclined to look to the government for help in making the mass media do what we desire of them, he had better ask himself one antiseptic question: "Am I envisaging myself as the official who is going to administer the policy which seems to me so good?" Justice Holmes remarked that, when socialism came, he hoped he would be "on the committee." You and I are not going to be on the committee which is charged with making newspapers or radio scripts better written and more accurate and impartial. It is very easy to assume that splendid fellows in our crowd will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society, but that is an iridescent dream. We must be prepared to take our chances with the kind of politicians we particularly dislike, because that is what we may get.

[31] In its decision in *DNC,* the Commission noted that it recognized the need to foster "a multitude of voices in the discussion of public issues" and stated that it "is seeking to promote a new technology which can make a most significant contribution in

This in turn demands the kind of searching inquiry the Commission began before the court of appeals rendered its decision[32] and thereby, in Judge McGowan's words, "dictate[d] the result in advance" (App. 491).[33]

In addition, when the issue is whether regulations should be adopted to advance the public's First Amendment interest there are many practical considerations that have to be taken into account, not the least of which is whether the Commission is equipped to handle the particular task. "[T]he Federal Communications Commission * * * would ill serve the public interest if the courts"—and, we should add, the Commission itself—"imposed such heavy burdens on [it] as to overtax [its] capacities."[34] In the end, the

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this respect—cable television. Because of the potentially great number of channels, cable opens up the possibility of common carrier channels, public access channels, etc." (App. 265–266). See *United States* v. *Midwest Video Corp.*, No. 71–506, decided June 7, 1972.

In its proposed rules on cable television the Commission has provided that, with respect to cable systems in major television markets, the system must have a number of different kinds of access channels. See 37 Fed. Reg. 3289, Section 76.251. For example, Section 76.251(a)(4) provides:

> * * * Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programing for such a channel. * * *

[32] See pp. 13–15; 18–20 *supra*.

[33] See *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571, 591–592, where the Interstate Commerce Commission, in an individual rate reduction proceeding, determined to continue following the practice it had adhered

Commission might conclude that although the aim is worthy, the means available for achieving it counsel against pursuing the particular course that has been advocated. However, this is not a conclusion open to the Commission under the decision of the court of appeals in this case, although as Judge McGowan stated in dissent (App. 490):

> The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. * * *

In sum, we believe that the Constitution permits a range of legislative choices regarding how the public's interest in freedom of speech over the airwaves is to be advanced, that in the absence of specific direction by Congress the Commission has leeway to decide not to adopt a particular course so long as it has reasonable grounds for refraining so to act and so long as the regulatory scheme it has adopted is consistent

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to in the past, although it intended to consider the issues there presented in a rulemaking proceeding where it could assess the industry-wide effect of a change in policy.

The Court there held that "We can see no justification for denying the Commission reasonable latitude to decide where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context." *Id.* at 592.

The posture of the present case is remarkably similar to that of *American Commercial Lines.*

[34] *Office of Communications of the United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994, 1005 (C.A. D.C.).

with First Amendment values, and that the court of appeals erred in holding otherwise. The remainder of our brief is devoted to showing that the Commission's decisions here were reasonable and in accordance with the regulatory structure Congress enacted.

C. THE COMMISSION'S DECISIONS HERE WERE IN ACCORDANCE WITH THE REGULATORY SCHEME CONGRESS ENACTED AND WERE REASONABLE IN THE CONTEXT OF THE SAFEGUARDS THAT THE FAIRNESS DOCTRINE AFFORDS THE PUBLIC

1. Broadcasters Are Not Common Carriers

Congress has chosen to promote broadcasting in the United States within the structure of the private enterprise system. Congress could have established another method but, in light of the inherent limitations on access to broadcasting, expressly "rejected the idea of the licensee being required to act as a common carrier with respect to transmission of comment on public issues" (Commission's opinion in *DNC,* App. 260). Section 3(h) of the Act, 47 U.S.C. 153(h), specifically provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." [35]

In its report on H.R. 9971, 69th Cong., the bill which became the Radio Act of 1927, the Senate Commerce Committee recommended a provision re-

[35] This provision also served to distinguish radio broadcasting from the Commission's common carrier jurisdiction, which in 1934 was transferred from the Interstate Commerce Commission to the Federal Communications Commission by Section 2(a) and Sections 201–223 of the Communications Act, 48 Stat. 1064, 1070, as amended, 47 U.S.C. 152(a), 201–223.

quiring licensees, as common carriers, to allow access in connection with public issue broadcasts. S. Rep. No. 722, 69th Cong., 1st Sess., p. 4. The provision stated (67 Cong. Rec. 12502, 12503): "if any licensee shall permit a broadcasting station to be used * * * for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: *provided*, that such licensee shall have no power to censor the material broadcast * * *. But Senator Dill, the Committee Chairman, objected that such a provision would be unworkable because it would force the broadcaster to "accept anything and everything that was offered him so long as the price was paid" (67 Cong. Rec. 12502). He argued that broadcasters would be forced "to give all their time to that kind of discussion or no public question could be discussed" (67 Cong. Rec. 12504). Senator Dill offered an amendment on the floor to eliminate the common carrier obligation and to limit the access requirement to candidates for public office. 67 Cong. Rec. 12501–12505.[36] The Senate adopted Senator Dill's amend-

[36] Senator Dill pointed out that (67 Cong. Rec. 12502):

* * * under the common-carrier provision a radio station is compelled to take any kind of broadcasting that anybody wants to offer, which would mean that it would take anybody who came in order of the person presenting himself and would be compelled to broadcast for an hour's time speeches of any kind they wanted to broadcast. This provision simply says that if a radio station permits one candidate for a public office to address the listener it must

ment (67 Cong. Rec. 12501–12505) and this was later accepted in the conference report, H.R. Rep. No. 1886, 69th Cong., 2d Sess., pp. 10, 14. As enacted, the amendment became Section 18 of the Radio Act of 1927, 44 Stat. 1170, and after re-enactment, Section 315 of the Communications Act of 1934, 48 Stat. 1088, 47 U.S.C. 315.[37]

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allow all candidates for the public office to do so, and to that extent there must be no discrimination.

Senator Howell objected that (67 Cong. Rec. 12504):

> The Senator from Washington has left in the bill a provision respecting candidates. It is important, but it has not anything like the importance of the provision he has stricken out—the discussion of public questions.

But Senator Dill replied (*id.*):

> I sympathize with a great deal of what the Senator is saying, but I want to remind the Senator of the danger of having the words "public questions" in the bill.
>
> That is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed.

[37] In exercising its discretion, the broadcaster would fail to carry out its obligations to the public if it did not make time available to candidates for political office on a reasonable basis, since the purpose of Section 315 "is to facilitate political debate over radio and television." *Farmers Union* v. *WDAY*, 360 U.S. 525, 534; see F.C.C. Memorandum on Second Sentence of Section 315(a), in *Political Broadcasts—Equal Time*, Hearings before Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84–90; see also *En Banc Program Policy Statement*, 25 Fed. Reg. 7291. Congress has now codified this duty to the limited extent of permitting the Commission to revoke licenses "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable

The importance of this legislative history, which the court below failed to discuss, is apparent. The court of appeals described its decision as merely a "modest reform" and therefore not inconsistent with Section 3(h) (App. 482–483). But to the extent that the licensee is required to sell time and is enjoined from exercising journalistic discretion regarding such factors as what persons should serve as spokesmen for a particular viewpoint on a public issue, what type of format this view should be presented in, how much time should be devoted to the particular presentation, and how frequently the view should be aired, then the licensee tends to become a common carrier with respect to public issues.[38] The decision below pushes broadcasting very far in that direction and does so on the basis of reasoning that goes beyond the narrow limits proclaimed at the beginning of the opinion (App. 449).

Thus, the court warns against judging "any sort of speech on public issues worthless" (App. 473) and states that even when a licensee has fully complied with the Fairness Doctrine with respect to a certain issue

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amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." Section 103(a)(2)(A), P.L. 92–225, approved February 7, 1972. Congress also revised the language of Section 315, *supra*, by adding the following italicized words: "no obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate." Section 103(b)(2)(B). Except to the extent modified, Congress has adhered to the original policy adopted in 1927.

[38] As the Commission stated in *DNC*, the result would be "a near-absolute right of any person who has the money to buy time" (App. 267).

such as the Vietnam war, the licensee must nevertheless sell time because "it is not *necessarily* clear that a particular antiwar editorial advertisement would add nothing to the public's information and understanding" (App. 471–472, emphasis in original). In addition, the court finds the Fairness Doctrine inadequate because "when an individual or group buys time to say its piece, the crucial controls are in its own hands" (App. 468). In our view, these statements, as well as others that served as a ground for the decision, indicate that the court did significantly more than institute a "modest reform." Instead, the court turned the question of access into a matter of constitutionl compulsion and, in the process, apparently transformed each refusal to sell time for editorial advertising into a First Amendment issue to be decided ultimately by the courts.

The evident intent of Congress not to go so far cannot be dismised with the assertion that the First Amendment nevertheless demands more. Congress "could surely have decreed that each frequency should be shared among all or some of those who wish to use it," *Red Lion, supra,* 395 U.S. at 390–391; it could have obligated licensees to act as common carriers; or it could have forbidden advertisements entirely. Congress chose instead to regulate the airwaves through the system of commercial broadcasting we have described above and, as Judge McGowan stated in dissent, "[t]his approach has never been thought to be other than within the permissible limits of constitutional choice" (App. 490). In light of Congress'

direction in Section 3(h), the Commission reasonably refused to recognize an individual right of access as broad as that suggested by the court below; but the Commission did begin a comprehensive inquiry to determine whether there is any "feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine," 30 F.C.C. 2d at 33 (see pp. 13–15 *supra*). This, we submit, is not only a constitutionally permissible approach, but also a sound method of dealing with such significant regulatory matters; indeed, it is precisely because of the need for proceeding in this way that Congress set up an administrative agency to handle the task.[39]

2. In the framework of commercial broadcasting prescribed by Congress, the Fairness Doctrine provides reasonable public access without discrimination and thereby satisfies First Amendment requirements

When the Commission's requirements under the Fairness Doctrine are compared with the requirements imposed by the court of appeals on the basis of its view of the First Amendment, it becomes evident that the court's disagreement with the Commission essentially involves policy differences about the manner in which broadcasters, as public trustees, ought to make their frequencies available for the discussion of public issues. The Commission has long held that under the Fairness Doctrine, licensees may not "themselves make radio unavailable as a medium

[39] See note 33 *supra*, discussing *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571, 591–592.

of free speech." *Report on Editorializing, supra,* 13 F.C.C. at 1248. Broadcasters must seek out spokesmen to present representative and contrasting views on controversial issues of public importance, although they may exercise journalistic discretion in selecting representative spokesmen and in determining what format shall be used for the presentations. This duty is a binding condition of the right to broadcast. See, *e.g., Fairness Primer,* 29 Fed. Reg. 10415; *En Banc Program Policy Statement,* 25 Fed. Reg. 7291; *Primer on Ascertainment of Community Problems by Broadcast Applicants,* 36 Fed. Reg. 4092.

This indeed was the thrust of *United Broadcasting Co.* (WHKC), 10 F.C.C. 515, relied on by the court of appeals (App. 487).[40] This 1945 decision is among many that contributed to the still-evolving Fairness Doctrine. The Commission there emphasized, as it later observed in the landmark *Report on Editorializing,* that the broadcaster's duty includes making

[40] In *United Broadcasting* a labor organization charged that a Columbus, Ohio, radio station, WHKC, refused to broadcast programs which solicited membership or discussed controversial subjects, such as race, religion, or politics; that it discriminated in administering this policy, and that it censored scripts. The case was settled. The station agreed that it would consider every request for time to broadcast concerning controversial public issues in an open minded and impartial manner; that requests for such time would be considered in light of its contribution to a balanced program schedule; and that the station would make time available for the full and free discussion of public issues on a nondiscriminatory basis. In approving the agreement, the Commission stated that "operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues" was inconsistent with the Communications Act's public interest standard. 10 F.C.C. at 518.

responsible provision for the discussion of controversial issues of public importance in the community served and making sufficient time available for a full discussion of those issues. 13 F.C.C. at 1249. But as the Fairness Doctrine developed, the Commission found that it was not necessarily required, as dicta in *United Broadcasting* had indicated, that broadcasters *sell* time to private individuals so long as the broadcaster used his facilities as a forum for discussion of public issues. Thus, after thorough study of the matter, the Commission came to the following conclusion in its *Report on Editorializing,* 13 F.C.C. at 1251–1252:

> It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making

> the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts.[41]

Although BEM failed to show that WTOP had not complied with these standards (App. 362–363), the Commission stressed that WTOP had a continuing duty to present a variety of views on the Vietnam

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[41] Because of this duty, the cases involving access to a regulated forum relied upon by the court of appeals are inapposite. *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W. D. Wis.), affirmed, 441 F. 2d 1257 (C.A. 7); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y.); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y.); *Hillside Community Church, Inc.* v. *City of Tacoma* 455 P. 2d 350 (Wash.); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Reptr. 430, 434 P. 2d 982 (Cal.). These are all cases in which those responsible for access to an advertising forum have no corresponding responsibility to assure balanced coverage of contending positions; nor are there special considerations, as here, suggesting that such an obligation should be imposed. In those cases, the question was simply whether the ideas expressed in editorial advertising were to be given access to the forum at all. Under the broadcasters' public interest obligations and the fairness doctrine, however, controversial questions of public importance must be given access to the broadcast forum, although the format for their presentation is subject to licensee discretion.

war, including views such as those advocated by BEM (App. 361–362). However, the Commission held that in the absence of a violation of the Fairness Doctrine, BEM had no "right" to buy time and WTOP had no duty to sell (App. 368). And the court of appeals itself stopped short of holding that WTOP necessarily must sell time to BEM (App. 488).

With respect to the *DNC* case, the networks are presently under a duty to present the views of major political parties on national issues, and they have done so in the context of news broadcasts and interviews, and in special presentations (App. 252). For example, in *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 454 F. 2d 1018 (C.A. D.C.), the court of appeals recently held that the CBS network acted pursuant to the Fairness Doctrine in offering broadcast time to the Chairman of DNC to present the views of the Democratic Party in a format to be determined by him. Similarly, the court sustained the American Broadcasting Company in its grant of time to DNC to present its views on the Vietnam war.[42] And as the statement indicates, *supra*, p. 9 n. 5, the National Broadcasting Company has no general policy against the sale of time to major political parties for broadcasts on public issues (App. 47). Thus, each of the major national networks, in diverse ways in fact makes time available to individuals and groups who wish to speak out on the issues of the day.

[42] See *Democratic National Committee* v. *Federal Communications Commission*, C.A.D.C. No. 71–1637, decided February 2, 1972, petition for a writ of certiorari filed April 28, 1972, No. 71-1405.

Under the Fairness Doctrine they must do so as part of their obligation as public trustees.

But the court of appeals concluded "that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time" (App. 473). The court also held that since broadcasters had opened "up a forum for some paid presentations, independently edited and controlled by members of the public" (App. 477), it is discriminatory for them not to sell such time to persons wishing to express their views on public issues, even though a broadcaster may be permitted under the Constitution to refuse to accept any advertisements of any sort (App. 475).

The court based these conclusions, however, on the incorrect premise that there is for this purpose a constitutionally significant distinction between programming and advertising time, that the broadcast day should be broken down into segments, each considered in isolation. The Communications Act makes no such distinction; the broadcaster's responsibility as a public trustee extends to every minute of every hour the station is on the air.[43] And the "forum" is the entire broadcast day, of which advertising is simply one component part.

To be sure, a station will usually exercise less control over advertisements than over its own programs, although when network programs are carried the

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[43] See, *e.g.*, *En Banc Program Policy Statement*, 25 Fed. Reg. 7291.

"crucial controls," as the court below put it, are not in the station's hands in any meaningful sense even during regular programming. But the court of appeals erred in assuming that broadcasters simply turn over or relinquish advertising time, allowing advertisers to do as they please, and that every broadcaster should do the same for editorial advertisements.[44]

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[44] See, *e.g.*, *Center for Law and Social Policy*, 23 P. & F. Radio Regulation 2d 187, 188 (1971), describing the control CBS exercises over advertisements:

> The CBS Television Network Program Practices Department (Department) has general responsibility for ensuring that "all matter transmitted by the network measures up to acceptable standards of propriety." The Department has a staff of thirty-four people in Hollywood and New York with an operating budget in excess of $650,000. The Department is headed by a network vice president, and each office is headed by a director. Five editors in New York and one in Hollywood work exclusively on commercial clearance: one additional person in each office has the responsibility for avoiding "commercial congestion;" the New York Office has four other persons to assist in the handling of advertising material; and a medical advisor reviews new medical claims and new presentations of previously substantiated claims. The clearance procedures are separate from the sale of advertising time.
>
> CBS states that advertisements are usually submitted in script or storyboard form: that all product claims are required to be substantiated; and that its staff, the advertiser and/or agency often meet to discuss the substantiation or presentation of a claim. After advertisements have been accepted for broadcast they will again be reviewed based on complaints from the public, inquiries from affiliates, or other information. A thorough review, including consultation of the CBS Law Department, is also conducted when notice of governmental agency action is received. Other sources utilized by the Department are the CBS Research Department, which examines the methodology of

Broadcasters do exercise control over advertisements and the Commission itself requires that:[45]

> every station * * * have a program to protect the public in this area. The extent of its program will, of course, depend upon the size and resources of the station, with the larger stations making a correspondingly greater effort in this field. However somewhere in every station operation (whether it be owner, manager, or staff), there must be cognizance of problems regarding deceptive or misleading advertising, familiarity with the important policies and developments in this area, and the responsibility for determining the acceptability of advertising offered to the station.

Compare *Federal Communication Commission* v. *American Broadcasting Co.*, 347 U.S. 284.

Thus, we submit that given the inevitable limitations on access to broadcasting, the question whether a licensee unconstitutionally discriminates against speech on public issues is meaningfully viewed in terms of how the licensee allocates air time between com-

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scientific studies submitted to substantiate claims; the CBS Engineering Department, which reviews such matters as claims relating to the performance of television sets; the National Safety Council; the Council of Better Business Bureaus; the American Dental Association; the Underwriters Laboratories; and relevant publications of the Federal Drug Administration, the Federal Trade Commission, etc. CBS also states that it consults with the NAB Code Authority, although "compliance with the NAB Code does not assure that a commercial is acceptable under CBS standards."

[45] *Id.* at 195; see also *Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising*. 23 P. & F. Radio Regulation 2d 1550 (1971).

mercial uses and public issue speech, rather than in terms of the format he chooses. The licensees' public interest duty under the Fairness Doctrine assures that broadcasters who derive their basic revenues from commercial advertising will also devote substantial air time to fair and balanced presentation of controversial issues of public importance. There is thus no invidious discrimination against the broadcasting of speech on public issues."[46]

In contrast to the court, the Commission does not make a distinction between broadcasters who accept commercial advertising and those who do not. Whether the broadcaster is serving the public interest depends on whether he is fulfilling his obligations under the Fairness Doctrine and that standard applies to commercial broadcasters such at WTOP as well as to noncommercial broadcasters, which are not covered by the court's ruling since they accept no advertising of any kind.[47] This overall approach to evaluating the licensee's performance in the public interest has been consistently followed by the Commission with the approval of both Congress and this Court, *Red Lion, supra,* 395 U.S. at 380, and indicates that, contrary

[46] For this reason, cases such as *Cox* v. *Louisiana*, 379 U.S. 536, *Fowler* v. *Rhode Island*, 345 U.S. 67, and *Niemotko* v. *Maryland*, 340 U.S. 268, are inapposite.

[47] See 47 U.S.C. 390, 392, 397, promoting the operation of noncommercial broadcasting stations. A federally chartered nonprofit corporation, the Corporation for Public Broadcasting, has been created to facilitate the development of educational broadcasting, "with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature * * * ." 47 U.S.C. 396(g)(1)(A).

to the ruling below, it does not make a constitutional difference that a commercial broadcaster accepts product advertisements.[48] At the least, the Constitution gives Congress and the Commission enough latitude to develop a reasonable regulatory scheme that makes no such distinction.[49]

3. In light of the serious problems in implementing a regulatory policy requiring licensees to accept editorial advertisements, the Commision reasonably refused to do so at this time

There are further reasons why the Commission could reasonably conclude, as it did, that although

[48] Product advertising, after all, exists in other media of communication which are not subject to the Fairness Doctrine and have no constitutional duty not to discriminate against public issue advertising.

[49] That the Commission may properly view the issue as whether the licensee has presented the point of view advocated by a particular spokesman, rather than as whether the viewpoint was presented in programming initiated or controlled by the licensee, is shown by this Court's recent affirmance of the three-judge district court's decision in *Capital Broadcasting Co.* v. *Mitchell*, Nos. 71–851, 71–919, affirmed *per curiam* Mach 27, 1972.

In that case broadcasters challenged, on First Amendment grounds, the ban on cigarette advertising in the electronic communications media set forth in the Public Health Smoking Act of 1969, 15 U.S.C. 1335. The court, with Judge Wright dissenting, rejected the broadcasters' claim that the ban suppressed debate on the smoking issue. Broadcasters could continue to disseminate information about cigarettes and were precluded only from doing so by means of advertisements on the air. Thus, the debate about smoking could continue in other formats of broadcasting.

Similarly, in this case, even if a broadcaster has a flat ban on advertisements about controversial public issues, those issues must nevertheless be presented during normal programming time and the Commission properly relied on this as adequately serving the public interest.

there is no policy against selling time for comment on public issues (App. 265), a licensee need not do so if it otherwise complies with the Fairness Doctrine. In its opinions in *DNC* and *BEM,* the Commission mentioned a number of undesirable consequences that could flow from a regulatory system, such as that contemplated by the court of appeals, outlawing flat bans on editorial advertisements.

First, the "right" recognized by the court of appeals is a constitutional right of access not for all individuals or groups but only for those wealthy enough to purchase time. In *DNC,* the Commission found this objectionable because "the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which '* * * has the financial resources and interest to purchase sustained access to the mass communications media * * *' (*Banzhaf* v. *F.C.C.,* 405 F. 2d 1082 (C.A.D.C. 1968), *certiorari denied,* 396 U.S. 842)" (App. 263). And in *Red Lion* this Court expressed its disapproval of a system wherein the "highest bidders" would get the available time, 395 U.S. at 392, or, as Judge McGowan described it in dissent, a system wherein "money alone determines what issues are to be aired, and in what format" (App. 490). Indeed, one commentator has already suggested that the regulatory scheme mandated by the court below on the basis of the First Amendment is itself unconstitutional because it discriminates against the poor.[50]

[50] See Note, 85 Harv. L. Rev. 689, 694 (1972), which proposes a convoluted solution to this by a "submarket rate system," *id.* at

Next, there is the problem of rationing time among those with enough money to buy it. Commissioner Johnson, dissenting in *DNC*, proposed that this be done on a first-come, first-served basis (App. 281). But that would still mean that affluent individuals or groups could dominate the limited amount of available time by continued requests for access; moreover, if there were a long waiting list of persons wishing to air their views, an issue sought to be addressed might become stale while other, less-immediate questions were discussed. It has been suggested that "[t]hese problems could be avoided by relaxing to a limited extent the constitutional principles against content discrimination and regulatory discretion." [51] But this, we submit, only serves to illustrate further the reasonableness of the Commission's refusal to embark upon such a venture, at least not without additional study, and thereby interject itself, as never before, into the day-to-day programming decisions of broadcasters.

Moreover, consideration must be given to what effects such a regulatory system would have on the Fairness Doctrine, and, particularly, on the *Cullman* doctrine,[52] which requires broadcasters to present, at

695. Professor Jaffe criticizes this proposal because it "would raise incredible administrative problems." Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 789 (1972).

[51] Note, 85 Harv. L. Rev. 689, 697 (1972). In seeking to solve such problems, others have proposed that representative community boards be set up to decide which persons shall be allowed to present their opinions. Note, 39 Geo. Wash. L. Rev. 532, 568 (1971).

[52] *Cullman Broadcasting Co.*, 40 F.C.C. 576; see *Red Lion*, *supra*, 395 U.S. at 377.

their own expense if necessary, opposing views on public issues when the licensee has chosen to broadcast a program giving only one viewpoint. The premise of *Cullman* is that the licensee's voluntary choice to present one side of the issue gives rise to an affirmative duty to present opposing viewpoints. If *Cullman* nevertheless applied, each editorial advertisement could generate claims for free reply time and the licensee would thus become obligated to correct an imbalance he had not created. Commissioner Cox, concurring in *BEM*, stated: "I fully support the *Cullman* doctrine in those cases where broadcasters elect to accept sponsored controversial issue programming or paid spots, but think that to *require* them to accept such matter would unreasonably expose them to erosion of their advertising revenues" (App. 369, emphasis in original).

It was suggested below that if financial harm or other problems result, the Fairness Doctrine can simply be "suspended" [53] in this area or the Commission can make "necessary adjustments." [54] These assertions, we submit, are a further indication of the imprudence of the court of appeals' decision. For if *Cullman* does not, or cannot, apply to editorial advertisements, then the public will hear only one-sided presentations on public issues by those rich enough to buy time. That is scarcely a "better" regulatory scheme than, or a significant improvement in, the present system which requires licensees to cover public issues and present

[53] App. 281 (Commissioner Johnson dissenting in *DNC*).
[54] App. 486 (opinion of the court of appeals).

contrasting views. At the least, the Commission could reasonably conclude that the foreseeable dangers militate against instituting such a regulatory scheme at this time.

Above all else, one thing is clear: the court below has required the Commission to embark upon a course that will involve it to an unprecedented degree in determining who shall get on the air to present their particular views. Under the issue-oriented Fairness Doctrine, this is a matter that traditionally has been left to the licensee's reasonable discretion.[55] But the court has thrust the Commission into the role of arbiter, with each refusal to sell time giving rise to a potential First Amendment question. Perhaps it is not inevitable that under the court's decision the Commission would find itself forced to decide competing claims to buy limited time on the basis of criteria that favor one person's speech over another's.[56] But the possibility is a real one—and one the Commission has, from the beginning, sought to avoid as it developed the Fairness Doctrine. Indeed, the needless assumption of such a role (which amounts to a form of selective prior restraint) by a government agency would not be easy to reconcile with the First Amendment. At the very least, we think the Constitution per-

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[55] In *DNC*, however, the Commission observed that "[t]here could be a case where the licensee's policy in this area would be arbitrary (*e.g.*, when he covers the issue, and in announcements of a few seconds duration, and then refuses to let others discuss the issue on this basis). No such case is or has been before us. * * *" (App. 269, n. 13).

[56] See II Chafee, *supra*, at 709, quoted in note 30 *supra*.

mitted the Commission to choose not to run the risk of setting out on such a course in these cases,[57] and to rely instead on the safeguards of the Fairness Doctrine to assure responsible broadcast journalism.

In summary, we submit that the existing public trustee approach adopted by Congress and the Commission is a proper way of serving the public's First Amendment interests in broadcasting, and that it was thus constitutionally permissible for the Commission here to decide to continue following that approach, which leaves the question whether editorial advertisement will be accepted as a matter of journalistic discretion to be decided by the licensee. Whether further adjustments and changes are desirable or possible is a matter under consideration in the Commission's current general inquiry into the Fairness Doctrine,[58] where there will be careful and thorough study of the evidence and opinions elicited. Whether and to what degree the licensee would be able to control the views and the manner in which they are expressed, the amount of time that should be allocated to public issue advertising, the experience of licensees who accept such advertising, how disputes regarding refusals to sell time to particular applicants would be resolved, on what basis a licensee could reject certain controversial advertising—all this and much more would have to be taken into account in determining

[57] Cf. *New York Times Co.* v. *United States*, 403 U.S. 713, 733 (White, J. concurring) (refusing in another context of selective prior restraint to "start the courts down a long and hazardous road * * * without congressional guidance and direction").

[58] See *supra*, pp. 13–15.

not only what kind of regulations the Commission should adopt to implement any rule requiring that licensees accept public issue advertising, but also whether such a rule should be adopted at all.[59]

The need for engaging in this kind of far-reaching and thorough inquiry[60] before making such a signifi-

[59] In the pending inquiry, the Commission has before it a wide variety of viewpoints. Some advocate an absolute right in public issue spokesmen to broadcast their views in a manner and format of their own choosing without any right of the broadcaster to reject requests for time except on grounds of obscenity. Such proposals range from sale of time for paid spot announcements to sale of time for lengthy public issue programs and announcements both on a paid and free basis. Other submissions argue for the maintenance of the status quo, claiming that any other system would impair the balance of the Fairness Doctrine in favor of wealthy spokesmen or groups and would impose an unfair obligation on broadcasters to make free time available under the *Cullman* doctrine. Some would allow the broadcaster to deny access, but only because the particular mode of presentation does not adequately advise the public of the issues; or because what is discussed is not a controversial issue of public importance. This proposal would permit rejection of requests in the discretion of the broadcaster on an *ad hoc* basis for reasons pertaining to the public interest, but subject to review under a reasonableness standard by the Commission.

[60] The Commission had opened its general inquiry into the Fairness Doctrine before the court's decision in this case, because, among other reasons, it had since 1968 "seen the law in this field explode, as knowledgeable and aggressive parties recognized the potential, and legal availability, of the broadcast media to expound on these public issues." *Democratic National Committee* v. *Federal Communications Commission*, C.A.D.C., No. 71-1738 (decided Feb. 22, 1972). Some of the more recent court decisions dealing with the Fairness Doctrine are: *Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute* v. *Federal Communications Commission*, 396 U.S. 842; *Retail Store Employees Union* v. *Federal Communications Commission*, 436 F.2d 248 (C.A.D.C.); *Neckritz* v. *Federal Communi-*

cant regulatory decision is one of the reasons why Congress created an administrative agency in this field to determine whether—as well as how—problems such as these can be surmounted. But the court of appeals has ordered the Commission up the slope without considering whether this is justified in light of the dangers and complexities of the climb; and from that order, purportedly a constitutional command, there can be no turning back.

The Constitution does not compel the court's result, but requires only that, in the context of an overall regulatory program that is consistent with the First Amendment, the Commission have reasonable grounds for deciding not to adopt a proposed affirmative policy that arguably would further encourage freedom of speech in broadcasting, such as that advocated by respondents in this case. As we have discussed above, that standard was met here, since the Commission's rejection of respondents' claims was supported by substantial considerations that have thus far led the Commission to conclude that First Amend-

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cations Commission, 446 F.2d 501, 502 (C.A. 9); *Friends' of the Earth* v. *Federal Communications Commission*, 449 F.2d 1164 (C.A.D.C.); *Green* v. *Federal Communications Commission*, 447 F.2d 323 (C.A.D.C.); *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 454 F.2d 1018 (C.A.D.C.); *Democratic National Committee* v. *Federal Communications Commission*, C.A.D.C. No. 71-1637, decided February 2, 1972, petition for a writ of certiorari pending, No. 71-1405, O.T. 1971; *Larus Brothers* v. *Federal Communications Commission*, 447 F.2d 876 (C.A. 4); *Democratic National Committee* v. *Federal Communications Commission*, C.A.D.C. No. 71-1738, decided February 22, 1972; *Healey* v. *Federal Communications Commission*, C.A.D.C. No. 24,630, decided March 3, 1972.

ment values in this area will be better served by continued reliance on the journalistic discretion of broadcasters operating in compliance with their obligations under the Fairness Doctrine. Accordingly, the court below should have affirmed the Commission's decisions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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